No. 14728

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM MAYS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Executive Order

Federal Register

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APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

In February, 1954, appellant William Mays, Everett Skeeters, C. L. Cox, Peter Hampton Gourley, and Herbert Marcellus Hogan were indicted in the United States District Court in and for the Southern District of California by the Grand Jury for a violation of United States Code, Title 18, Section 371, and Title 12, Section 95(a). The first count under Section 371 charged the defendants with conspiring to acquire and transport gold bullion [Clk. Tr. pp. 2-4], and the second count charged them with

wilfully and knowingly holding and transporting approximately 350 troy ounces of gold bullion, estimated .850 fine, in Riverside County, within the Central Division of the Southern District of California [Clk. Tr. pp. 4-5]. The District Court had jurisdiction of the cause under Section 3231 of Title 28, United States Code, which confers on the District Courts original jurisdiction "of all offenses against the laws of the United States."

A trial by jury was had upon the above indictment, the Honorable Ernest A. Tolin, Judge presiding. Everett Skeeters was found not guilty on both counts; Herbert Marcellus Hogan was found not guilty as to Count One and guilty as to Count Two; C. L. Cox was acquitted on motion before submission of the case to the jury; and Peter Hampton Gourley entered a *nolo contendere* plea to Count Two of the indictment prior to trial. The verdict on June 22, 1954, as to appellant William Mays was not guilty as to Count One and guilty as to Count Two. By Judgment and Commitment filed July 19, 1954, appellant received five years' probation, sentence of one year and one day having been suspended [Clk. Tr. p. 11].

On July 29, 1954, the appellant filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit [Clk. Tr. pp. 12-13]. He thereafter filed a designation of points on appeal [Clk. Tr. pp. 14, 15, 16] and a designation of contents of record on appeal [Clk. Tr. pp. 18-19]. The United States District Court made its order excusing the prepayment of costs and fees and providing

that appellant could appeal *in forma pauperis* [Clk. Tr. p. 20].

This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1291.

II.
THE STATUTE INVOLVED.

The indictment was brought under Section 95(a) of Title 12, United States Code, which will not be set forth herein verbatim because of its length. However, it does provide in pertinent part as follows:

> "Section 95(a). *Embargo on bullion or coin;* hoarding; requirement of disclosure; penalty (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> "(A) investigate, regulate or prohibit the importing, exporting, hoarding, melting, or earmarking of *gold or silver coin or bullion,* currency or securities * * *." (Emphasis added.)

Executive Order No. 6260, passed August 28, 1933, is published in the United States Code Annotated immediately following Section 95(a) at page 451 and relates to "Hoarding, Export, and Earmarking of Gold Coin, Bullion, or Currency; Transactions in Foreign Commerce." In effect the Order provides, among other things, that after the date of the Order no person could acquire or

hold gold coin, gold bullion, or gold certificates except pursuant to licenses issued by the Secretary of the Treasury subject to such further regulations as he would prescribe.

Pursuant to the above Act and Executive Order, regulations were promulgated by the Secretary of the Treasury, and those governing the dates of the transactions in this case are contained in 13 Federal Register (hereinafter cited as F. R.), pages 2742 to 2750 (31 C. F. R. pp. 261 to 267). However they were substantially amended on September 29, 1952, in 17 F. R., pages 7888 to 7896, which amendments were in effect on the dates involved herein.

Other amendments to the regulations are found as follows:

(1) 17 F. R., page 8039 (Sept. 5, 1952);

(2) 17 F. R., pages 11441 to 11442 (Dec. 17, 1952);

(3) 18 F. R., page 3366 (June 11, 1953);

(4) 18 F. R., page 5134 (Aug. 27, 1953).

The penalty provision of Title 12, United States Code, Section 95(a), is set forth in Section 54.11(b) and is expressly stated to be applicable to the regulations.

III.
ARGUMENT.

A. The Question of the Nature of the Substance in Government's Exhibits I, II and III Was Properly Submitted to the Jury.

By its very definition in Section 54.4 of 17 F. R., page 7889 "gold bullion" is a catch-all phrase which includes at least several different types of gold. Specifically, the Regulation states that the term "* * * includes, *but not by way of limitation,* semi-processed gold and scraps of gold * * *." (Emphasis ours.) It then goes on to definitely eliminate (1) fabricated gold, (2) metals with less than five troy ounces per ton, and (3) unmelted gold coin. Therefore, we are obviously not precluded in this definition from finding that gold in other forms than those specified may be included in the words "gold bullion." This would, of course, mean a consideration of whether the gold had been "smelted or refined" and whether its value depended "primarily on the gold content and not upon its form." Under the circumstances of this case, these were all questions which had to be submitted to the jury. In fact, this was done by the Court without any objection from, and even with the request of counsel. Judge Tolin read the pertinent regulations relating to the various definitions of different types of gold to the jury [Rep. Tr. pp. 105-109]. Subsequently Mr. Cooper, who represented a defendant other than appellant, objected that the Court had instructed the jury as a matter of law the gold in question was "gold bullion" [Rep. Tr. p. 119].

He then said, "It is my understanding of the law, it is a question of fact for the jury." Counsel for appellant adopted this exception [Rep. Tr. p. 121] and requested no further instructions. Later the Court directly submitted the question to the jury as follows:

> "Everything in the case has to be proven. It has to be proven that with respect to Count Two that Exhibits I, II and III were gold bullion * * * it must be proved that the substance in those exhibits was actually what is charged in the indictment."

Mr. Dunaway specifically stated that he had no exceptions to this charge [Rep. Tr. p. 134] and thus agreed to the submission of the question to the jury. Appellant is not excused from failure to make exceptions unless personal liberty is involved or a grave error amounting to a denial of a fundamental right is involved.

See:

Humes v. United States, 182 Fed. 485 (8 Cir., 1910);

Zamlock v. United States, 193 F. 2d 889 (9 Cir., 1952), cert. den. 343 U. S. 934.

For the reasons set forth in the following pages it is submitted that there is no basis for excusing appellant from excepting to the submission of the question to the jury in the instructions. In other words, he should not be relieved at this time of his implied acquiescence that the matter was one of fact to be submitted to the jury.

In the case of *United States v. Levy,* 137 F. 2d 778 (2 Cir., 1943), six bars of melted scrap gold jewelry had been recovered from the appellant. He was convicted by a jury of wilfully and knowingly possessing gold bullion without a license under Title 12, United States Code,

Section 95. The pertinent part of Judge Clark's Opinion, at page 781, is set forth below:

"[3] Turning to appellant's second point, we are clear that the six bars of melted scrap jewelry held by him were gold bullion within the terms of the authorizing act and the Presidential order. The jewelry was not of pure gold, some being gold plate, some gold filled, and some solid gold. It cannot reasonably be contended that Congress intended a general exemption of this scrap gold, once melted, since that would substantially weaken the effectiveness of the Act in preventing gold hoarding and exporting. See *British-American Tobacco Co. v. Federal Reserve Bank of New York, supra,* 2 Cir., 104 F. 2d at page 654. And there was a convincing expert testimony that melted scrap gold is generally considered gold bullion. The Secretary of the Treasury, too, in promulgating regulations concerning scrap gold must necessarily have considered it bullion within his authority to regulate under the Act. Witness his regulations issued September 12, 1933, requiring records of acquisitions and holdings of unmelted scrap gold; and see, also Provisional Regulation No. 35(c), for the purchase of gold fillings, clippings, pieces, and the like, 31 CFR 54.35(c).

"[4] It was generally understood when Executive Order 6260 was issued that gold bullion included gold in a form containing varying degrees of base metals. See 31 U. S. C. A. §§327, 329, 332, 360, 361. And at the trial one expert testified that the gold content of bullion need be no more than one-tenth of one per cent. True, the Treasury Regulations issued January 15, 1934, set a somewhat higher standard defining gold bullion as 'any gold which has been put through a process of smelting or refining that is in such form that its value depends upon the gold content and not

upon the form, but does not include gold coin or metals containing less than 5 troy ounces of fine gold per short ton.' See 31 CFR 52.4. And the Provisional Regulations issued under the Gold Reserve Act in effect adopted this definition. See 31 CFR 54.4. But in any event, there was expert testimony that the bars here were within this definition. And although other expert testimony was to the contrary, *the question was for the jury; and its finding of guilt settles the matter.*" (Emphasis added.)

The Court will note the 1943 Regulations involved in the *Levy* case did not have the present specifications of types of gold to be included or excluded. In other words, scrap gold was not specifically included as gold bullion as it is at the present time and the Court was not dealing with a situation where the gold involved was included in the regulation by name. Otherwise, the definition of bullion in that case was exactly the same as the regulation with which we are concerned herein. It is of interest that the District Court did not rule as a matter of law the gold was bullion although the Court of Appeals felt this fact was clearly proved. It was still felt it was a question for the jury and its determination settled the matter.

Where definitions have been laid out in the Regulations, this does not necessarily mean reasonable minds could not differ as to whether or not a particular substance would qualify as any given type of gold. Disputes may exist among the witnesses (and appellant spends several pages attempting to enumerate them here), and it is then for the jury to resolve any conflict.

It is submitted by the Government that there is no basis in reason or fact for the proposition advanced by appellant that the Court should have ruled as a matter of law Ex-

hibits I, II and III were not gold bullion. The jury in this case still had the exclusive function of determining whether or not the substance was within the purview of the definition of bullion. The evidence which was sufficient to support the jury's verdict, and which prevented the Court from ruling on this question as a matter of law, will be discussed fully in the following pages.

B. The Evidence Was Sufficient to Support the Verdict.

It is of course, well settled that the Court of Appeals will not weigh evidence to determine if it is sufficient to support a verdict, that the Court will take the view most favorable to the Government, and will give to the Government the benefit of all inferences which reasonably may be drawn from the evidence. The fact that "some of the evidence is consistent with innocence is not determinative of the sufficiency of the evidence."

See:

Woodward Laboratories, Inc., et al. v. United States, 198 F. 2d 995 (9 Cir., 1952);

C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (9 Cir., 1952), cert. den. 344 U. S. 892;

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (9 Cir., 1948);

Affronti v. United States, 145 F. 2d 3 (8 Cir., 1944);

United States v. Bucur, 194 F. 2d 297 (7 Cir., 1952).

Not only does the Government urge that the question in this case was properly treated as a matter of fact for the

jury, but the verdict of the jury is amply supported by the evidence.

It was clearly established that the substance in Government's Exhibits I, II and III was not "gold in its natural state (more commonly termed as "placer gold"). The witnesses testified that it was not such [Rep. Tr. pp. 36, 43, 61, 69, 90-n], and Section 54.4(12) states that "gold in its natural state means gold recovered from natural sources which has not been melted, smelted, or refined, or otherwise treated by heat or by chemical or electrical process." Not only has much of the gold in Government's Exhibits I, II and III been melted, but it was also "treated by heat." It is not significant for the purposes of this brief, as appellant claims, that gold amalgam (retort sponge) is dealt with under Section 54.19 entitled "Gold in its Natural State." Section 54.3 sets forth that the titles are only for ready reference and do not constitute part of the regulations. Also, fabricated and semi-processed gold are treated under one heading in Section 54.4(10), and yet fabricated gold is expressly excluded from the definition of gold bullion and semi-processed gold is expressly included. Thus, it could well be that gold amalgam (retort sponge) is within the definition while placer gold would not be so construed. There is no reasonable basis for the conclusion made by the appellant that the Secretary of the Treasury contemplated in any sense that gold amalgam was gold in its natural state. This is particularly true since Section 54.19(a) refers directly to the definition of "gold in its natural state" in Section 54.4(12) which definition would exclude gold amalgam under Section 54.19(b).

There is substantial testimony in the record, which the jury was entitled to believe, to prove the substance was

gold bullion. Government's Exhibits I, II and III contain 800 parts of gold, while gold bullion generally can contain as low as 200 parts of gold in a thousand [Rep. Tr. p. 21]. The gold had been treated [Rep. Tr. p. 37]. Some people use heat in smelting [Rep. Tr. p. 88]. There are melted pieces in the exhibits [Rep. Tr. pp. 17, 20, 30]. The part that is melted is considered gold bullion [Rep. Tr. pp. 22, 23]. Gold bullion is an alloy and might contain silver [Rep. Tr. p. 21]. Gold bullion is mixed with lead or silver or copper [Rep. Tr. p. 86]. Exhibits I, II and III contain gold of exactly .850 fine and 127 to 130 fineness in silver [Rep. Tr. p. 15]. Gold bullion could be in lumps [Rep. Tr. p. 87]. The value of the gold is not upon its form [Rep. Tr. p. 81]. All the substance in Government's Exhibits I, II and III would be considered in the gold trade as gold bullion [Rep. Tr. p. 90-p, q].

The words used in the Regulations are to be given their normal and ordinary meaning. Specifically, there is no indication that any unusual significance attaches to the word "smelt." Webster's new International Dictionary, 2nd Edition, states it means primarily "to melt or fuse" and this appears to be its common usage, although smelting can be done through other processes. There was very little doubt the two large pieces of melted gold expressly discussed in the transcript and which weighed approximately 22 ounces were considered by Mr. Carr and Mr. Gourley to be gold bullion [Rep. Tr. pp. 30-31, 73-74]. A careful reading of all of Mr. Carr's testimony will show that he believed these cakes were bullion *both* because they were melted and on account of the fineness of gold [Rep. Tr. pp. 30-32]. Since the word to "smelt" includes to "melt," the conclusion of this expert witness is not "inherently impossible" or "improbable." In *Glaser*

Kohn and Co. v. United States, 224 Fed. 84, the Court of Appeals for the Seventh Circuit held, at page 87, that "*it is solely the province of the jury to determine the weight of expert opinion.* In the present case there is nothing in the evidence *inherently impossible,* or even *improbable.* The error is not well assigned." (Emphasis added.)

Besides Mr. Carr there were two other men who testified as experts in the gold trade, Mr. Gourley and Mr. Hanson. Both were familiar with the field and the latter testified he had handled gold and minerals since 1934 [Rep. Tr. p. 90-n]. He further stated the Government's entire exhibit would be considered gold bullion [Rep. Tr. p. 90-q]. The jury was entitled to believe Mr. Carr's testimony that the two melted pieces recently mentioned in the transcript were gold bullion, *particularly since the definition of gold bullion in the Regulations containing the word "smelt" had been read to him previously* [Rep. Tr. p. 24]. His conclusion indirectly indicated that in the trade "smelt" could be synonymous with "melt." There was no direct testimony that such was not the case. The jury was also entitled to believe the testimony of the mineral dealer, Mr. Hanson, that the entire exhibit was bullion since his testimony is corrobrated by the physical evidence itself. A careful scrutiny by the Court of the gold in Exhibits I, II and III is most strongly urged by the Government, as an accurate picture of its condition cannot be obtained from the transcript. This is particularly true because of the remarks made by counsel from time to time during the questioning period. This writer personally inspected almost all of the pieces of gold large enough to handle and found small globules and particles of what appeared to be melted gold on practically every piece.

Many had considerable streaks of gold similar to that on the above two pieces, all of which is easily visible to the eye. No doubt much of the gold is retort sponge, but such a large amount has been melted that it has definitely taken on the character of bullion. (This is not to say, however, that retort sponge could not itself be considered within the definition of bullion.)

In *Alaska Juneau Gold Mining Co. v. United States,* 94 Ct. Cl. 15 (1942), it appears that plaintiff had obtained newly mined gold, *melted* it and cast it into bars. It was 83% pure gold, 14% silver and 3% foreign matter. It was held by the Court that the term "gold bullion" as it has been consistently understood, interpreted and applied over many years, included gold of this kind. Although that case did not apparently involve the Regulation concerned herein, the opinion is still helpful in showing the trade meaning of the phrase "gold bullion." If the word "bullion" was usually understood to include gold that has been melted, then it is not unreasonable to believe the Secretary followed that common usage in employing the word "smelted" in the Regulation.

In the *Levy* case, 137 F. 2d 778, *supra,* the Court stated at page 781:

> "It cannot reasonably be contended that Congress intended a general exemption of this scrap gold, once melted, since that would substantially weaken the effectiveness of the Act in preventing gold hoarding and exporting."

The Government submits the same proposition is true with respect to the gold in this matter. Further, there was expert testimony in the *Levy* case that melted scrap gold was *generally considered* gold bullion, although the definitive Regulation was in effect at that time. Also, it is of

interest that there was a *conflict* in the expert testimony but the jury's "finding of guilt settled the matter." The Court further stated that the Secretary must have necessarily considered it bullion and within his authority to regulate under the Act and cited the appropriate regulations. Here, too, it is unlawful to hold or transport at any one time an amount of retort sponge which exceeds in fine gold content 200 troy ounces without a license. See Section 54.19(b). Title 12, United States Code, Section 95(a), is entitled "Embargo on *Bullion* or Coin, * * *" (emphasis added) and the Executive Order issued pursuant thereto relates only to gold coin, *bullion* or currency. Even the Gold Reserve Act of 1934, which is partially the source of the regulations and is contained in Title 31, United States Code, Sections 441 to 446, is entitled "Gold Coin and Gold Bullion." Thus the sources of the Regulations all contemplate the regulation of gold *bullion*. It therefore appears under the reasoning of the *Levy* case that the Secretary had considered retort sponge itself as bullion and within his authority to regulate. As stated above, it was regulated in that it was unlawful to hold or transport it in excess of 200 troy ounces without a license. The amount involved in this case was over 300 ounces.

In the case of *Zamloch v. United States,* 193 F. 2d 889 (9 Cir., 1952), cert. den. 343 U. S. 934, this Court held that the jury's verdict must be affirmed unless there was an error, defect, irregularity or variance affecting a substantial right of the defendant, or that the guilt of the defendant was not found by the jury according to procedure and standards appropriate for trial in federal court.

Further, in the absence of a motion in the trial court for a judgment of acquittal or for a new trial, no question

can ordinarily be presented in the appellate court as to the sufficiency of the evidence to support the verdict. In *United States v. Jonihas,* 187 F. 2d 240, at page 241, the Court of Appeals for the Seventh Circuit stated an exception has been recognized in cases where such a condition of unfairness and injustice exists as would appeal to the Court's discretion and prompt it to correct the error in the proper administration of justice.

See also:

Meehan v. United States, 70 F. 2d 857 (9 Cir., 1934).

There are no circumstances here which would place this case under the exception to the rule. This was a question of fact which the jury decided against the defendant and where there was sufficient evidence to uphold the verdict. Further, it is not a case where the defendant can say he was free under the Regulations to hold and transport retort sponge over 200 troy ounces without a license. Whether this gold was bullion or sponge, or both (as the Government contends), it was illegal gold.

For the foregoing reasons it is submitted that the verdict should be affirmed.

Respectfully submitted,

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